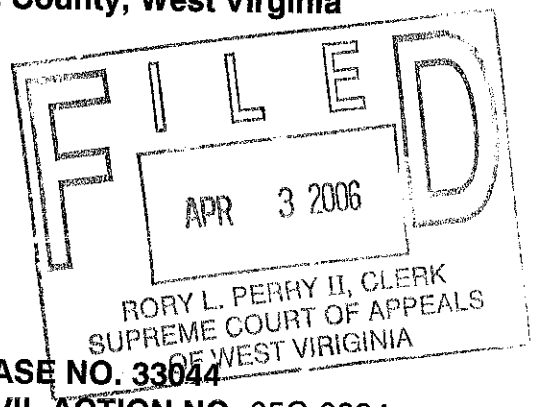
IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

at Charleston

Appeal from the Circuit Court of Cabell County, West Virginia



CAPTAIN EARL F. LEGG, JR.,
Plaintiff-Appellee

v.

SUPREME COURT CASE NO. 33044
CABELL COUNTY CIVIL ACTION NO: 05C-0394
The Honorable John L. Cummings, Judge

MAYOR DAVID A FELINTON, and
THE CITY OF HUNTINGTON, WV and
THE CITY OF HUNTINGTON, WV
FIREFIGHTER'S CIVIL SERVICES
COMMISSION,
Defendants-Appellants

BRIEF OF THE APPELLANTS

Scott McClure, WVSB #7747
Counsel for Appellants
City of Huntington
P.O. Box 1659
Huntington, WV 25717-1659
(304) 696-4480

J. Roger Smith, II WVSB #5837
Counsel for Appellee
6 Norway Avenue
Huntington, WV 25705-1361
(304) 697-2400

QUESTIONS PRESENTED

I. Did the Circuit Court of Cabell County, West Virginia err in holding that the City of Huntington did not have "reasonable suspicion" to drug test Captain Earl Legg?

II. Did the Circuit Court of Cabell County, West Virginia err in holding that there was not exigent circumstances to suspend Captain Earl Legg without pay from his employment with the City of Huntington?

III. Does the City of Huntington have just cause to terminate Captain Earl Legg from his employment with the City of Huntington?

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STATEMENT OF THE CASE

On April 10, Firefighter Michael Giannini was arrested for possession of crack cocaine. (Transcript. 32) Subsequently, on Wednesday, April 14, 2004, Firefighter Giannini and his then girlfriend (now wife, Brandi Giannini) met with Deputy Chief Jerry Beckett, to discuss the Firefighter's arrest. (Transcript p. 32, 35, 38) At that time, Firefighter Giannini informed Deputy Chief Beckett that there were other members of the "force" that needed "help" as well (Transcript p. 38 *and* Memo of Record of Deputy Chief Jerry Beckett) Exhibit A.

Additionally, Brandi Giannini informed Chief Beckett that Earl Legg Jr. was the person who had gotten Firefighter Giannini involved with smoking crack cocaine. (Transcript p. 34 *and* Memo of Record of Deputy Chief Jerry Beckett) She went on to inform him that Captain Legg smokes crack while on duty in the hose tower after everyone goes to bed and also drinks beer on duty. (Transcript p. 48 *and* Memo of Record of Deputy Chief Jerry Beckett) It is significant to note that during the time that Mrs. Giannini was informing Deputy Chief Beckett about Captain Legg, Firefighter Giannini was begging her not to tell him those things. (Transcript p. 47 *and* Memo of Record of Deputy Chief Jerry Beckett) Later that day, however, Firefighter Giannini informed Deputy Chief Beckett that he had a telephone conversation with Captain Legg and "begged" him to get help before he was arrested and lost his job. (Transcript p. 49) Deputy Chief Beckett then prepared a "Memo of Record" to memorialize his conversations with the Gianninis and reported the incident to Chief Greg Fuller.

After a discussion with Deputy Chief Beckett about Captain Legg, Chief Fuller decided that he would need to ask Captain Legg to take a reasonable suspicion drug test. (Transcript p. 70) He based this decision on the civilian report of Brandi Giannini and statements of Firefighter Giannini; Captain Legg's recent charge of driving under the influence; Captain

Legg's pattern of sick usage; his general nervousness and agitation and his general change in personality. (Transcript. 71)

Policy 19 (J) permits the City of Huntington to request employees to submit to a "reasonable suspicion" screen if the charging officer feels that the employee has exhibited behavior that may be consistent with illegal drug use. Specifically, "reasonable suspicion testing" is defined by Policy 19 (J) as follows:

> Reasonable suspicion for requiring an employee to submit to drug and/or alcohol testing shall be deemed to exist when an employee manifests physical or behavioral symptoms or reactions commonly attributed to the use of controlled substances or alcohol. Such employee conduct must be witnessed by as least one supervisor trained in compliance with the City's Drug-Free Workplace Policy. Should a supervisor observe such symptoms or reaction, the employee must submit to testing.

See Exhibit B.

On April 18, 2004, Chief Greg Fuller requested Captain Legg to submit to a reasonable suspicion drug screen in accordance with Policy 19 (J) of the City of Huntington Rules and Regulations. (Transcript p. 74) However, before doing so, Chief Fuller advised the accused officer that he was under investigation. Id. Chief Fuller informed Captain Legg he would need to submit to a reasonable suspicion drug test based upon the information received from the Gianninis, coupled with the attendance issues and unusual behavior patterns. Id.

At this time, Captain Legg consented to the drug test but informed the Chief that he had a "few things to take care of" before leaving for the test. (Transcript p. 75, 140) Captain Legg then exited the Chief's company for approximately ten minutes. (Transcript p.75, 141) Upon returning, Chief Fuller and Captain Legg departed for EMSI, the laboratory wherein the sample was to be taken. Id.

Randolph Pauley, Administrator of Occupational Health Testing Programs with EMSI

testified as to the manner in which the urine sample was collected from Captain Legg. (Transcript pp. 105-117) Pauley indicated that he was present when the sample was collected and he personally placed the urine samples in two separate vials in the presence of Captain Legg. (Transcript p. 109, 123, 129) Further, Pauley indicated that Captain Legg signed the chain of custody form in his presence. (Transcript p. 111, 123) Pauley further remarked that the sample provided appeared to be "very clear." (Transcript p. 113-114)

Pauley further explained the steps taken to ensure that no sample is tampered with upon collection. (Transcript p. 114-116) He indicated that once a sample has been obtained it is placed in a "secure locked file cabinet and left there until the Airborne personnel will arrive to pick it up." (Transcript p. 114) Additionally, Pauley testified that after the specimen bottles themselves are sealed, they are then placed into a shipping bag with an adhesive tamper-resistant seal. (Transcript p. 115) This bag is then placed in a larger bag for shipping by Airborne that also has an adhesive tamper-evident seal on it. (Transcript p. 115) Pauley perceived there to be no possibility of a sample being tampered with upon receipt by the collection agency. (Transcript p. 116)

Dr. Ernest Raba, the Medical Review Officer for Corporate Support Systems, Inc., reviewed the results of the urine sample taken on April 18, 2004 from Clinical Reference Lab and determined that the sample provided was "Substituted-Refusal to Test." (Transcript p. 14, *See also* Exhibit C) Subsequently, on May, 6 2004, a split sample of the "specimen" was tested by Lab Corp. (See Exhibit D) Dr. Raba likewise reviewed this report and again determined that the specimen provided was "Substituted -Refusal to Test Reconfirmed." (Transcript p. 17) Basically, Dr. Raba testified that the sample provided by Captain Legg had the characteristics of water and not human urine. Id.

Policy 19 (J) of the City of Huntington's General Policy and Procedure Manual provides that employees must submit to drug and alcohol testing wherein mandated by policy. Further, the policy defines "refusal to test" as "conduct that would obstruct the proper administration of a test." Moreover, the policy provides that an employee who engages in prohibited conduct shall be subject to termination of employment. Captain Legg received and signed for a copy of said policy on February 18, 1997. (See Exhibit E)

On April 22, 2004, after receiving the information from the medical review officers, Chief Fuller suspended Captain Earl Legg from duty without pay from the City of Huntington Fire Department due to the "refusal to test" and based upon exigent circumstances related to drug use by an employee in a safety sensitive position. (Transcript p. 92) Chief Fuller believed that "exigent circumstances" existed to suspend Captain Legg immediately due to the safety sensitive nature of a fire fighter's duties and as a result of the lab reports (Transcript. 71, 90) Chief Fuller testified that not only does a firefighter's own life depend upon his physical and mental condition but the lives of other firefighters and citizens of the municipality as well. (Transcript p. 80) On this date, Chief Fuller mailed a letter to Captain Legg advising him of a hearing pursuant to WV Code §8-14A-3. (See Exhibit F)

On July 14, 2004 a hearing board composed of three of the accused's fellow firefighters determined that Chief Fuller did not have reasonable suspicion to have Captain Legg submit to a reasonable suspicion drug test. However, the City appealed that decision to the City of Huntington Firemen's Civil Service Commission and a hearing was held on September 24, 2004. By Order dated February 17, 2005, the three-member Civil Service Commission unanimously found just cause to suspend Captain Legg without pay pending termination by Mayor David Felinton.

On May 13, 2005, Captain Legg appealed the decision of the City of Huntington Firemen's Civil Service Commission to the Circuit Court of Cabell County, West Virginia. On July 14, 2005, the Circuit Court of Cabell County held that the City did not have "reasonable suspicion" to drug test Captain Legg and that there were no exigent circumstances to suspend Captain Earl Legg without pay from his employment with the City. The Circuit Court indicated that the decision of the Firemen's Civil Service Commission was "arbitrary and capricious." These rulings were made despite the Commission's amply supported factual findings to the contrary. The City of Huntington now appeals the decision of the Circuit Court of Cabell County, West Virginia.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE

I. The Circuit Court of Cabell County, West Virginia erred in holding that the City did not have "reasonable suspicion" to drug test Captain Earl Legg.

In Appeal of Prezkop, the West Virginia Supreme Court of Appeals held that **a final order of a police civil service commission based upon a finding of fact will not be reversed by a circuit court upon appeal unless it is clearly wrong or is based upon a mistake of law. (Emphasis Added)** 154 W.Va. 759, 179 S.E.2d 331 (1971). Furthermore, in In Re Queen, the West Virginia Supreme Court stated that the Supreme Court's review of the circuit court's decision is made in view of the Commission's action is *de novo*. 196 W.Va. 442, 473 S.E.2d 483 (1996). Thus, the Supreme Court reviews the Commission's adjudicative decision from the same position as the circuit court.

In In Re Queen, the Supreme Court went on to state that "[t]he Commission's adjudicative decision should not be overturned by either court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. Review under this standard is narrow and the reviewing court looks to the Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision. Id. *See also* Collins v. City of Bridgeport, 206 W.Va. 467, 525 S.E.2d 658 (1999). A Court may reverse the Commission's decision as clearly wrong or arbitrary and capricious **only if** the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to difference in view or the product of the Commission's expertise. Id. In assessing whether the Civil Service Commission's decision was based upon substantial evidence, the court is obliged to give reasonable deference to the Commission's factual findings. The "clearly wrong" and "arbitrary and capricious" standards of review are deferential one which presume the agency's actions are valid as long as the decision is supported by substantial evidence. Id.

Thus a reviewing Court must first determine whether the Civil Service Commission's decision was based upon "substantial evidence" and secondly, whether its findings and conclusions were adequately explained. **If they were, the circuit court's order reversing the Commission must be set aside as a matter of law.** (Emphasis added) Id.

"Substantial evidence" requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. **If the Commission's factual findings is supported by substantial evidence, it is conclusive.** (Emphasis added) Id. Neither the West Virginia Supreme Court nor the circuit court may

supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence. Id. Thus, if the Civil Service Commission's factual finding is supported by substantial evidence, it is conclusive.

In the case at bar, the Firemen's Civil Service Commission had substantial evidence to support its finding that there existed "reasonable suspicion" to drug test Captain Legg. This decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law. As such, the decision of the Civil Service Commission must be upheld. The circuit court cannot supplant the factual finding of the Commission merely by identifying an alternative conclusion. The Commission clearly had a substantial and rational basis for its decision.

The Firemen's Civil Service Commission found that reasonable suspicion existed to require Captain Earl Legg to submit to a urine examination (drug screen). *See* Order of the Firemen's Civil Service Commission, Exhibit G. Specifically, the Civil Service Commission cited the testimony of Chief Greg Fuller, Deputy Chief Jerry Beckett, and Deputy Chief Tim Provaznik who states that the actions and behaviors of Captain Earl Legg were consistent with illicit drug use. Id. Further, the Commission recognized that Fuller, Beckett and Provaznik had all been trained and certified to ascertain such behavior. (Transcript p.50)

Specifically, Deputy Chief Tim Provaznik testified that Captain Legg had a recent charge of driving under the influence of alcohol. (Transcript p. 47-51) Additionally, Deputy Chief Provaznik stated that Captain Legg has used a substantial amount of excused and unexcused sick leave which was "out of character" for him. Id. He further testified that excessive absenteeism is one of the factors to look for in determining whether you should conduct a "reasonable suspicion" drug test of an employee. Id.

Deputy Chief Jerry Beckett testified that all the Deputy Chiefs attended certification class for reasonable suspicion tests. (Transcript p. 50) Also, Deputy Chief Beckett stated that much of the behavior tending to show the use of illicit narcotics may be revealed over a period of time as opposed to viewing one isolated incident. (See Transcript p. 50-52) He further testified that after his conversations with the Gianninis about Captain Legg, the "pieces of the puzzle" began to fit. Specifically, based upon the information received from the Gianninis combined with the recent DUI, excessive absenteeism, and change in behavior, he suspected that Captain Legg was using illicit drugs. Id.

Chief Greg Fuller reiterated the testimony of Deputy Chief Beckett in that he too felt that Captain Legg had undergone a "change in personality" and that, coupled with unusual patterns of sick leave usage and the statements of the Gianninis, mandated him to conduct a reasonable suspicion drug test. (Transcript p. 71) In fact, the department's policy mandates that the Chief investigate any civilian complaint against a member of the department. Prudence likewise requires investigation. Furthermore, Chief Fuller stated that due to the safety sensitive nature of Captain Legg's position, he believed it was necessary to conduct a "reasonable suspicion test" based upon the evidence before him. (Transcript p. 80)

The West Virginia Supreme Court of Appeals has also upheld the drug testing of an employee where an employee's job responsibility involves public safety or the safety of others or the drug testing is based upon an employer's good faith objective suspicion of an employee's drug usage. See Twigg v.Hercules, Corp., 406 S..E.2d 52 (1990). The Court acknowledged that an employer has a legitimate interest in curtailing the use of illicit drugs and insuring the efficient and proper operation of the workplace. Id. at 56-57. Further, this Court recognized that employers should be "free from potential liability brought on by employee's drug usage which may ultimately result in harm to others or mismanagement, misfeasance or incompetence in

the workplace." Id. at 56-57 Thus, the West Virginia Supreme Court of Appeals opted to adopt the lesser standard of "reasonable suspicion" as opposed to "probable cause."

It would be a tremendous injustice to find that an employer could not conduct a reasonable suspicion drug test of an employee when the employer has received credible information from a civilian and a ***fellow firefighter*** that a Captain is using illicit drugs; coupled with a recent DUI; numerous excused and unexcused absences; and a change in general behavior. To do so would virtually prohibit an employer, such as the City, from ensuring the safety of its citizens when it has a reasonable good faith objective suspicion of an employee's drug usage.

Furthermore, despite the contentions of the Appellee, there exists no requirement within Policy 19 (J) of the Rules and Regulations for the City of Huntington that employees who are subject to reasonable suspicion drug testing be sent for such testing on the precise day that "reasonable suspicion" conduct is observed[1]. Additionally, testimony elicited during the hearing before the Civil Service Commission revealed that much of the behavior tending to show the use of illicit narcotics is best observed over a period of time as opposed to viewing one isolated incident. No evidence to the contrary was presented on the matter.

In the case at bar, the uncontroverted testimony in this matter is that witnesses Chief Greg Fuller, Deputy Chief Jerry Beckett and Deputy Chief Tim Provaznik were all trained in identifying behavior that would be consistent with illicit drug use. Furthermore, all witnesses

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[1]The Circuit Court in its Order continually refers to whether or not there were exigent circumstances to conduct a reasonable suspicion drug test. However, there is no requirement for exigent circumstances related to a reasonable suspicion drug test. "Exigent circumstances" only applies to whether or not a civil service employee may be terminated prior to a hearing. Furthermore, the Court drew improper references from the evidence before the Commission. Specifically, the Court considered the four (4) days between the report to Chief Fuller and the actual drug test too long. However, as we have previously stated, exigent circumstances does not apply to a reasonable suspicion drug test. Furthermore, it is significant to note that Captain Legg was not tested until four (4) days after the initial report because that was when he returned to work (Transcript, p. 88).

had observed changes in Captain Legg's behavior. Then, once the Gianninis informed Deputy Chief Beckett of Captain Legg's drug usage, Chief Fuller had no alternative but to conduct a reasonable suspicion drug test.

The Rules and Regulations of the City of Huntington Fire Department require the Chief of the Fire Department to "promptly investigate, or cause to be investigated, any reports from personnel or citizens of any violation of laws, ordinances, Rules and Regulations, or provisions of the Working Agreement by personnel of the department." As such, it was incumbent upon the Chief to conduct a reasonable suspicion drug test of his officer where he has received credible information from a fellow firefighter that the Captain also had a problem with crack cocaine.

PROPOSITION OF LAW NUMBER TWO

II. The Circuit Court of Cabell County, West Virginia erred in holding that there were no exigent circumstances to terminate Captain Earl Legg from his employment with the City of Huntington.

West Virginia Code §8-14A-3(b) states that when a civil service accused officer faces a recommended punitive action of discharge, suspension or reduction in rank or pay, but before such punitive action is taken, a hearing board must be appointed and afforded the accused civil service officer for a hearing conducted pursuant to the provisions of article fourteen, section twenty, or article fifteen, section twenty-five of this chapter: Provided; that the punitive action may be taken before the hearing board conducts the hearing **if exigent circumstances exist which require it. (Emphasis added)**

Furthermore, in Alden v. Harpers Ferry Police Civil Ser. Comm., the West Virginia Supreme Court of Appeals held that the express language of West Virginia Code §8-14A-3(b)

requires a pre-disciplinary hearing to be afforded to a civil service police officer (or fireman) facing certain forms of disciplinary action **unless exigent circumstances exist to preclude such a proceeding (Emphasis Added)** Thus, before a civil service worker may be disciplined through discharge, suspension, or reduction in rank or pay, he/she must be afforded a predisciplinary hearing before the hearing board **unless there exist exigent circumstances that require the recommended disciplinary action to precede such hearing. (Emphasis Added)** 209 W.Va. 93, 543 S.E.2d 364 (2001).

Exigent circumstances may be found where an employee uses illicit drugs while employed in a safety sensitive position. See generally, City of Huntington v. Black, 187 W.Va. 675, 421 S.E.2d 58 (1992) and Twigg v. Hercules, Corp., 406 S.E.2d 52 (1990).

In accordance with §8-14A-3 of the West Virginia Code, **exigent circumstances existed to warrant Earl Legg's suspension pending termination without a pre-deprivation hearing. (Emphasis Added)**

Captain Legg was charged with violating the City of Huntington's Drug and Alcohol Testing Policy. The City maintains a "zero tolerance" policy as it relates to drug use among its employees. Chief Fuller testified that due to the safety sensitive nature of a firefighter's duties, exigent circumstances did exist and warranted the immediate suspension of Captain Legg. Chief Fuller, a firefighter with over twenty years of experience, credibly testified that not only will a firefighters own life be dependent upon his physical condition and state of mind but the lives of other firefighters and citizens of the municipality as well. (Decision at p. 3)

During the hearing before the Commission, the Medical Review Officer, Dr. Ernest Raba, testified that the "urine specimen" provided by Earl Legg was determined to be "Substituted - Refusal to Test." Likewise, the "split specimen" tested on May 6, 2004, determined that the specimen provided was "Substituted-Refusal to Test Reconfirmed." Dr. Raba also testified that

the sample provided by Captain Legg was not "consistent with normal human urine." (Transcript p. 12) The urine sample provided by Captain Legg had a creatinine level of less than one and such a creatinine level had the qualities of water and could not be considered human urine. (Transcript p. 12)

Furthermore, Randolph Pauley, an employee of Health Research Systems-EMSI, testified as to the integrity of the samples collected by EMSI. Specifically, Mr. Pauley indicated that he saw no possibility of a sample being adulterated or tampered with upon receipt by EMSI. (Transcript p. 116) Moreover, Mr. Pauley indicated that there is no reason for the employees at the collection site to want to alter the results of a specimen test one way or the other. (Transcript p. 116)

Policy 19 (J) of the City of Huntington's General Policy and Procedures Manual provides that employees must submit to drug and alcohol testing where mandated by the policy. ***Further, the policy defines refusal to test as "conduct that would obstruct the proper administration of a test."*** Moreover, the policy provides that an employee who engages in prohibited conduct shall be subject to termination of employment. (Emphasis Added) Earl Legg signed for a copy of this policy on February 18, 1997. (See Exhibit E)

As such, based upon the test result of the two separate urine samples as well as the evidence before him, Chief Fuller suspended Captain Legg without pay pending termination. Due to the safety sensitive nature of firefighter's duties, exigent circumstances did exist and warranted the immediate suspension of Captain Legg.

There is ample evidence in the record to support the Commission's finding that "exigent circumstances" existed to justify the immediate suspension of Earl Legg in light of his violation of the drug testing policy and the safety sensitive nature of his employment.

PROPOSITION NUMBER THREE

III. The City of Huntington had Just Cause to terminate Captain Earl Legg from his employment with the City of Huntington and the decision of the Firemen's Civil Service Commission was not arbitrary and capricious.

Although the Circuit Court of Cabell County, West Virginia did not specifically address the issue, it is implicit in the Circuit Court's holding that the City did not have Just Cause to terminate Captain Earl Legg as the Court ordered that he be returned to work. As such, it is necessary for the City to address this issue.

First and foremost, the Firemen's Civil Service Commission specifically held that "Just Cause" existed for the termination of Captain Legg. Specifically, the Civil Service Commission held the following:

> The Commission further finds that Captain Earl Legg, Jr., did violated Policy 19(J) of the City of Huntington's Policy and Procedure Manual. Policy 19 (J) prohibits conduct that would obstruct the proper administration of the test. The Commission finds that the accused officer, by substituting his urine sample as testified to by Dr. Raba, has engaged in such conduct.
>
> Further, the Commission finds that the policy provides for termination for violation of its said policy and that such consequence is reasonable considering the safety sensitivity nature of a fireman's duties. Thus, the Commission finds just cause existed for termination of the accused officer.

This decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law and must be upheld. See Appeal of Prezkop, 154 W.Va. 759, 179 S.E. 2d 331 (1971). Furthermore, the Commission's adjudicative decision should not be overturned by either court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." In Re Queen, supra. Review under this standard is narrow and the reviewing court looks to the Commission's action to determine whether the record reveals that a substantial and rational basis exists. Likewise, the "clearly

wrong" and the "arbitrary and capricious" standards of review are deferential ones which **presume the agency's actions are valid** as long as the decision is supported by substantial evidence. **(Emphasis Added)** 196 W.Va. 442, 473 S.E.2d 483 (1996). The decision of the Civil Service Commission is well-founded and based upon the testimony and evidence presented at the underlying hearing and must be presumed to be valid.

Policy 19 (J) of the City of Huntington's General Policy and Procedures Manual clearly provides that employees must submit to drug and alcohol testing where mandated by the policy. **Further, the policy defines refusal to test as "conduct that would obstruct the proper administration of a test." Moreover, the policy provides that an employee who engages in prohibited conduct shall be subject to termination of employment. (Emphasis Added)**

Based upon the testimony of Dr. Raba, the two urine samples tested were determined to be "Substituted-Refusal to Test." Furthermore, the EMSI employee, Randolph Pauley, testified as to the integrity of the sample and the chain of custody. As such, the only conclusion that can be reached is that Captain Legg substituted or tampered with his urine screen. To do so is prohibited conduct which warrants termination from employment.

CONCLUSION

On seventeen (17) separate occasions the Circuit Court erroneously applied the legal principle of "exigent circumstances." The Court consistently and erroneously held that "exigent circumstances" were necessary in order to warrant a "reasonable suspicion" drug test. (Findings of Fact and Conclusions of Law for Order Granting Plaintiff's Appeal in Reversing the Order of the Huntington, W.Va. Firefighters Civil Service Commission, hereinafter "Circuit Court Order", pp. 1, 3, 4, 5, 6 and 7) Further, the Court erroneously ruled that employees who are

subject to reasonable suspicion drug testing be sent for such testing on the precise day that "reasonable suspicion" conduct is observed and that such "reasonable suspicion" observations cannot occur over time. (Circuit Court Order p. 4, 6) Policy 19(J) of the City of Huntington Rules and Regulations does not prohibit "reasonable suspicious" from being developed over a period of time. As a result of this action, the Circuit Court has arbitrarily and erroneously grafted an additional requirement for "reasonable suspicion."

Additionally, the Circuit Court supplanted the factual findings of the Commission by "finding" that the Commission "ruled in favor of the Plaintiff as the City did not prove that Captain Legg tampered with the urine screen concluding that there is a human factor about urine tests and that mistakes can happen and the Commission could not determine what happened to the specimen that was given by the Plaintiff." (Circuit Court Order p. 7-8) The Circuit Court indicated that by finding that the Plaintiff violated Policy 19 (J) by refusing to test is "arbitrary and capricious" and an "abuse of discretion" given the Commissions finding to the contrary as contained in the record. (Circuit Court Order p. 8) The Commission never made such a finding. (See Commission Order) The Commission did rule, however, that "the accused officer, by substituting his urine sample as testified to by Dr. Raba" has engaged in conduct that would obstruct the proper administration of the test. (Commission Order p. 4)

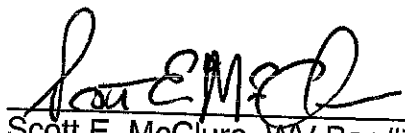
The uncontroverted testimony in this matter is that witnesses Chief Greg Fuller, Deputy Chief Jerry Beckett and Deputy Chief Tim Provaznik were all trained in identifying behavior that would be consistent with illicit drug use. Furthermore, all witnesses had observed changes in Captain Legg's behavior. Then, once the Gianninis informed Deputy Chief Beckett of Captain Legg's drug usage, Chief Fuller had no option but to conduct a "reasonable suspicion" drug test. The decision of the City of Huntington Firemen's Civil Service Commission holding that there was "reasonable suspicion" to drug test is well supported by the evidence. As such, the

decision of the City of Huntington Firemen's Civil Service Commission is not clearly wrong and must be upheld.

Furthermore, before a civil service worker may be disciplined through discharge, suspension, or reduction in rank or pay, he/she must be afforded a predisciplinary hearing before the hearing board unless there exist exigent circumstances that require the recommended disciplinary action to precede such hearing. Exigent circumstances may be found where an employee uses illicit drugs while employed in a safety sensitive position. There is ample evidence in the record to support the Commission's finding that "exigent circumstances" existed to justify the immediate suspension of Captain Earl Legg in light of his violation of the drug testing policy and the safety sensitive nature of his employment.

Lastly, Policy 19 (J) of the City of Huntington's Policy and Procedure Manual prohibits conduct that would obstruct the proper administration of a drug test. The Civil Service Commission found that Captain Legg substituted his urine sample. This holding is well-founded and based upon the evidence and testimony presented by Dr. Raba and Randolph Pauley. Furthermore, to do so is grounds for termination. The Civil Service Commission held that the policy provides for termination for violation of its said policy and that such consequence is reasonable considering the safety sensitive nature of a fireman's duties. Thus, the Commission found that just cause existed for termination of the accused officer. The decision of the Firemen's Civil Service Commission is not clearly wrong nor is it based upon a mistake of law and **must be upheld. (Emphasis added)** *See* Appeal of Prezkop, 154 W.Va. 759, 179 S.E.2d 331 (1971) and In Re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996).

Respectfully Submitted,
Appellants By Counsel



Scott E. McClure, WV Bar #7747
City Attorney
Post Office Box 1659
Huntington, WV 25717-1659
Telephone No. (304) 696-4480

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FIREFIGHTER'S CIVIL SERVICES
COMMISSION,
Defendants-Appellants

CERTIFICATE OF SERVICE

I, Scott E. McClure, City Attorney for the City of Huntington, hereby certify that a copy of the Brief of the Appellants was served on the following persons this 31st day of March, 2006 by United State mail, postage prepaid:

J. Roger Smith, Esquire
Attorney at Law
6 Norway Avenue
Huntington, West Virginia 25705

Scott E. McClure, WV Bar #7747
City Attorney